BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVSION
STATE OF CALIFORNIA

In the Matter of the Dispute Between: STUDENT, Petitioner, vs. RIVERSIDE UNIFIED SCHOOL DISTRICT and DESERT SANDS UNIFIED SCHOOL DISTRICT, Respondents.	OAH No. N2005110775

DECISION

Administrative Law Judge, Judith L. Pasewark, Office of Administrative Hearings, Special Education Division, State of California, heard this matter in Riverside, California, February 27, 28, March 1, 2, 3, 6 and 7, 2006.

Petitioner, (Student), was represented by attorney, Ralph O. Lewis, Jr., of the Law Office of Ralph O. Lewis, Jr. Student did not attend the hearing. Student's parents, (Mother) and (Father), did attend the hearing.

Respondents, Riverside Unified School District (RUSD) and Desert Sands Unified School Districts (DSUSD), were represented by Maria E. Gless of Best, Best & Krieger, LLP. Elka Kelly-Parker, Director of Special Education, attended on behalf of DSUSD. Dr. Steven Morford, SELPA Director, attended on behalf of RSUD.

The record remained open until March 20, 2006, for receipt of written closing briefs from each counsel. The matter was submitted and the record closed on March 21, 2006.

ISSUES

1. Did DSUSD deny Student a free and appropriate public education (FAPE) beginning on February 4, 2005, through April 30, 2005?

A. Student contends the District denied him a FAPE by failing to have an Independent Educational Evaluation (IEP) in place by his third birthday.
B. Student contends the March 8, 2005 meeting represented a formal IEP which denied him a FAPE with an offer of placement at Monroe School.

2. Did RUSD deny Student a FAPE beginning in May of 2005, including the 2005 extended school year (ESY)?

C. Student contends the IEP presented on July 14, 2005, was predetermined by the District.
D. Student contends his parents were denied meaningful participation in the IEP meeting.
E. Student contends he was denied an FAPE by the omission of a general education teacher at the IEP meeting.
F. Student contends the RUSD assessment was not administered by qualified personnel.
G. Student contends the RUSD test results were invalid.
H. Student contends the District failed to develop appropriate services for him.
I. Is Student entitled to reimbursement for Dr. Lenington's evaluation?
J. Is Student entitled to reimbursement for the LIFE Program?

FACTUAL FINDINGS

Jurisdictional Facts

1. Student was diagnosed as autistic in December 2005. Student was and is eligible for special education services pursuant to California Education Code section 56441.11, subdivision (b)(1)(A). Student's parents are acting on his behalf in all matters referred to herein.

2. Student resided within the jurisdictional boundaries of the DSUSD from January 1, 2004, to April 30, 2005. As of May 1, 2005, Student moved to Riverside, California, where he continues to reside within the jurisdictional boundaries of the RUSD. Both DSUSD and RUSD are public school districts located in Riverside County, California. Both districts are responsible for implementation of the Individuals with Disabilities Education Act (IDEA).

Desert Sand Unified School District

3. At age two, Student was referred to the Inland Regional Center (IRC) to address developmental and speech concerns. Student's Early Start Individualized Family Service Plan (IFSP) provided a preschool class three times per week plus speech/language therapy.

4. In December 2004/early January 2005, IRC informed Mother that IRC services would terminate upon Student's third birthday. On January 5, 2005, Mother contacted DSUSD, and provided basic information regarding Student. At the same time, IRC faxed its assessment package to DSUSD with a request for an initial Individualized Education Plan (IEP) evaluation. The information specified that Student resided in DSUSD, and would be three years of age on February 4, 2005.

5. On January 27, 2005, DSUSD sent the parents an assessment evaluation packet. The packet instructed the parents to bring the completed documents and signed Assessment Plan to the IEP meeting scheduled for February 1, 2005. The parents did not attend this meeting.

6. The District made several attempts to reschedule the meeting. On February 28, 2005, the school psychologist spoke with Mother. Their discussion centered upon the looming break in IRC services. Mother emphasized that she wanted a full assessment done as the parents did not believe the evaluation performed by the IRC was accurate. The school psychologist offered to continue Student's services through the District, including temporary placement in a Monroe School Special Day Class (SDC). The Monroe SDCs provided instruction in a group setting for three hours, five days per week. Mother declined these services and requested that the IRC services be continued. The IRC agreed to maintain IFSP services until March 18, 2005.

7. Although the parents had not signed the Assessment Plan, and Student had not been evaluated by the District, the initial IEP meeting took place on March 8, 2005. Both parents were present. The IEP form was incomplete. The IEP form did not contain any goals or objectives for Student. The IEP form did not specify any services to be performed, the manner in which services were to be performed or the length and duration of any services. None of the DSUSD team members had ever met, observed, or tested Student. Not all IEP team members were present for the IEP meeting.

The District did not make a final recommendation of placement at this meeting. The DSUSD team repeatedly reminded the parents that the District could not prepare a formal offer of placement until they completed a new assessment of Student. DSUSD informed the parents that all options being offered as of March 8, 2005, were temporary. DSUSD further informed the parents that when the assessment was completed, the issues of goals, objectives and placement would be revisited and revised depending on Student's needs. The District offered immediate placement at Monroe School on a temporary basis to avoid a lapse when IRC terminated services. DSUSD believed at the time that Monroe School placement would meet Student's temporary needs until a complete assessment could be obtained.

8. The parents left the meeting without signing the Assessment Plan. Mother faxed the executed Assessment Plan to the District on March 10, 2005. The parents never returned telephone calls or responded to a written request to schedule the assessment and reconvene the IEP meeting.[1]

Riverside Unified School District

9. Mother initially contacted RUSD in May or early June 2005, when she spoke to Margaret Jacobson.[2] RUSD made a formal referral of Student to its pre-school assessment team. This was followed up with a letter to the parents, which specified the information the District needed from them for the evaluation. The letter specifically referenced "medical, psychological, language or other evaluations in your possession."

June 16, 2005 Assessment Plan

10. On June 16, 2005, Student was evaluated.

Karen Clem performed the Speech and Language Assessment. Ms. Clem has been a Speech/Language Pathologist for 25 years, and has worked at the Sunshine School for l7 years. She has a license in Clinical Rehabilitation in Speech and Language, and a license for Speech Therapy. Ms. Clem has a MS in Communication Science and Disorders.

Ms. Clem administered the Preschool Language Scale-4 (PLS-4) to Student. Ms. Clem performs between 160-180 evaluations per year and uses PLS-4 in approximately 17 of those evaluations.

Test results indicated Student had an auditory comprehension rate at the one year, nine month level, and expressive communication skills at the one year, eight month level.

11. Ines Anderson tested for Student's special education eligibility. Ms. Anderson has worked as a school psychologist in the RUSD for seven years. She has credentials in Single and Multiple Subjects, Bilingual Education, and School Psychology. She has a General Education Credential and has taught general education classes an additional eight years. Ms. Anderson has a MA in Counseling.

Ms. Anderson assesses all types of disabilities for the District and has done more than 200 special education assessments. Ms. Anderson administers 5-10 Childhood Autism Ratings Scales per year; at least 80 Developmental Profiles per year; and approximately 100 Visual Motor Integration tests per year. In order to assess Student's present levels, Ms. Anderson administered the following tests:

[1] DSUSD had no further contact from the parents until November 10, 2005, when the parents faxed a request for Student's records.

[2] Ms. Jacobson has been the Assistant SELPA Director for RUSD since July 2005. From 1998 to 2005, Ms. Jacobson was the Principal at Sunshine Elementary School.

a. Developmental Profile II. Test results placed Student at the two years, two month level.

b. Developmental Activities Screening Inventory (DAISI-II). Test results placed Student at a developmental age of two years.

c. Developmental Test of Visual-Motor Integration (VMI 5th ed.). Test results placed Student at a developmental age of two years, ten months.

d. Childhood Autism Rating Scale (CARS). Test results placed Student in the mild to moderate autism range.

12. At the time of the testing, Student had no verbal skills, therefore no articulation test was given. No non-verbal testing was done on Student. No cognitive testing was administered. A school nurse was not present to do a health screen for the evaluation.[3]

July 14, 2005 IEP Meeting

13. The IEP meeting took place on July 14, 2005. Mother was present. According to Mother, the IEP meeting was "more of a presentation than discussion." Mother did not offer information about Student at the meeting. She saw her role as a "sponge to soak up as much information as possible." Mother told the RUSD team that she was there to listen, and she wanted to discuss the IEP with her husband before providing comments or asking substantive questions. Mother also requested to observe the various SDCs available at Sunshine School.

14. Ms. Jacobson was present at the IEP meeting and spoke about Student's present levels which were derived from Student's assessment. Mother did not dispute the findings nor indicate the information was incorrect. Although Mother questioned parts of the assessment, she did not verbally disagree or tell the team of her concerns. Mother did not request an independent evaluation. She did not tell the team about Dr. Lenington.

15. The IEP was incomplete. Not all members of the IEP team were present, including a general education teacher. There was no parental input or written comments. The goals and objectives listed for Student were not measurable. The IEP did not specify services or the amount/duration of services. There was no written offer of a specific placement.

16. There was discussion of the morning programs for autistic children in the SDCs at Sunshine School. The District offered temporary placement of Student in a SDC at Sunshine School to commence as soon as Mother observed the classrooms (to determine which class) and registered Student for school. Mother did not agree to placement at Sunshine School on a temporary basis. Mother informed the IEP team that Student was in an in-home Applied Behavioral Analysis (ABA) program, and she wanted RUSD to pay for it. Mother did not sign the Informed Consent to the IEP.

[3] At the time, the District did not have a nurse. After speaking with the parents, if the District determined that a health screen was necessary, a referral to a nurse would be provided.

17. Based upon all factors available at that time, the District offered the SDCs at Sunshine School as an interim program for Student. The District had 50 days to complete the IEP based upon the school year (until October 2005). The IEP team told Mother that after a review of Student's ABA program, the IEP meeting would need to reconvene for the District to complete its offer of placement.

Subsequent Contacts

18. On August 11, 2005, Ms. Jacobson requested to observe Student's in-home ABA program. A home visit was scheduled for September 1, 2005. During the visit, Ms. Jacobson asked questions and requested that Mother provide her with the progress notes from Student's ABA program. The notes were never provided to the District. Mother informed Ms. Jacobson that Student was receiving private speech therapy. Ms. Jacobson requested that Mother provide information about Student's speech therapy. Mother never did so. At the home visit, Mother was again informed that another IEP was necessary.

19. The parents never requested an IEE nor did they convey a refusal to consider possible SDC placement. The parents observed several SDCs on two separate occasions, the last time occurring in November 2005. As a result, the District continued to seek parental involvement in completing the IEP. The District made several attempts to reschedule the IEP. In October 2005, Mother again canceled, and indicated she would contact the District to reschedule. She never did so.

Dr. Lenington's Assessment

20. Melanie J. Lenington, PhD, is a licensed clinical psychologist. She is a qualified expert witness as is referenced in her CV.

21. Dr. Lenington books appointments several months in advance. She was first contacted by Parents early in 2005. The July 2005 appointment was booked in May 2005. Dr. Lenington indicated she was contacted by the parents to obtain better information regarding their son. Dr. Lenington requested that the parents provide records as requested. They did so, and they continued to bring additional records as requested.

22. Dr. Lenington tested Student between July 29 and August 28, 2005. The District's testing was done June 18, 2005. Dr. Lenington's testing was more detailed than the District's. She spent eight hours testing and observing Student. The District spent approximately one hour testing and observing.

23. Dr. Lenington found that Student's scores were scattered. Student scored in average ranges in some areas to significantly delayed in others. In her opinion, Student was not cognitively delayed.

24. Dr. Lenington is a self-described "stickler for correctness." She found several areas of concern in the tests administered by the District. The concerns centered on the reliability of some tests and the manner in which others were administered. In Dr. Lenington's opinion, the District's testing was insufficient to obtain all necessary information concerning Student's disability. Dr. Lenington also observed the SDCs at Sunshine School. She found the teaching methodology to be eclectic, which in her opinion, would not be beneficial to Student.

25. Dr. Lenington concurred with the District's diagnosis of autism. She did not believe, however, that Student could learn in a group setting or even a small group of two. Dr. Lenington did not observe Student in his prior preschool [group] setting, nor did she report on Student's progress in the private preschool.

Other Testing Testimony

26. Pamela Pagel conducts Sensory Integration testing for RUSD. She has been an Occupational Therapist for RUSD for six years. She is a licensed OT and is certified in Sensory Integration testing. Ms. Pagel concurred with Dr. Lenington's OT assessment of mild to moderate deficiencies in OT areas. In reviewing the test results of both the District and Dr. Lenington, Ms. Pagel concluded that there was no significant difference in Student's motor skills test results.

27. Monica Chavez has been a School Psychologist for RUSD for 16 years. She has both a BA and MA in Special Education. She has credentials in both Special Education and Multi-teaching. Her job duties include assessing children. Ms. Chavez reviewed the IRC evaluation,[4] and opined that the information contained in the IRC report was comparatively consistent with the District's assessment results. The VMI and CARS were not affected by Student's illness as the information comes from the parents.

Ms. Chavez also reviewed Dr. Lenington's evaluation. She found Dr. Lenington's results consistent with the District's results. As she put it, "The results are the same. The conclusions are different."

LIFE Program

28. Mother estimated that she contacted the LIFE Program in February 2005. A home evaluation was done in March or April 2005. At that time the parents decided they wanted an ABA clinic based program. As of April 2005, Student was privately placed in the LIFE Program, which is the in-home program Student is currently using.

[4] The IRC evaluation reported that Student had participated in a regular preschool and "has apparently made a good adjustment." Several tests had been administered, including CARS. The results provided a provisional diagnosis of autism. Further, Student appeared to be delayed, although the extent of that delay was unclear.

29. Scott Cross, the Clinical Director of the LIFE Program provided an extensive description of how Lovaas methodology and the LIFE Program work. The LIFE Program is based upon the l987 Lovaas Study which highlights the need for intensive one-on-one contact. The ultimate goal of LIFE is "best outcome" which is defined by (1) normal cognitive measures; (2) placement in general education without assistance; and (3) removal of diagnosis of autism. LIFE emphasizes an individualized program. Consistency is crucial. It was emphasized that the Lovaas method is most successful when utilized on a 40 hour per week basis.

LEGAL CONCLUSIONS

Applicable Law

1. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA or the Act) and California law. (20 U.S.C. § 1412(a)((1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education related services include developmental, corrective, and supportive services, such as speech-language pathology services and occupational therapy, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

2. In 1986, the Act was amended by adding "Part C" which serves children from birth to age three. (20 U.S.C §§ 1431-1445.) Part C requires that states receiving funds under IDEA provide appropriate early intervention services as set forth in an Individualized Family Service Plan (IFSP). (20 U.S.C. § 1436.)

3. Part B of the Act provides services to children between the ages of three and 21. (20 U.S.C. § 1412(a)(1)(A).) Within Part B, the program providing services to children between the ages of three and five is known as the "Part B Preschool Program." (*Pardini v. Allegheny Intermediate Unit* (3rd Cir. 2005) 420 F.3d 181.)

4. In an initial referral of a toddler to special education services, the law requires that the local educational agency assess the student, and if the student is eligible, offer a free and appropriate public education by the student's third birthday. (Cal. Code Regs., tit. 17, § 56321.) The intent is to provide children who are participating in early intervention programs with a smooth and effective transition into preschool programs. (20 U.S.C. § 1412(a)(9).)

5. In order to meet this objective, starting when the child reaches two years, six months of age, the Regional Center must engage in transitional activities. (Cal. Code Regs., tit. 17 § 52112.) Such activities include notification to the parents that the child may be

eligible for services under Part B, notification of the appropriate school district, SELPA, or county office, and holding an IFSP meeting to specify the transition steps. (*Ibid.)*

6. The transitional process of initial referral begins with a written request or referral for assessment. (Ed. Code, § 56302; Cal. Code Regs., tit. 5, § 3021.) The parents must be provided a written assessment plan to which they have at least 15 days from receipt to sign. (Ed. Code, § 56312.) Once the child has been referred for initial assessment, the district then has 50 days from receipt of the parental consent to complete the assessment and develop the initial IEP. (20 U.S.C § 1414(a)(1)(c); Ed. Code, § 56302.1.) In the case of pupil school vacations, the 50 day time shall recommence on the date that the pupil school days reconvene. (Ed. Code, § 56344, subd. (a).) The time frame for completion of the IEP was extended to 60 days effective July 1, 2005, by federal law (20 U.S.C. § 1414(a)(1)(C)(i).), and amended California law as of October 9, 2005. (Ed. Code, § 56344, subd. (a).)

7. Before any action is taken with respect to an initial placement for special education, the school district must assess the student in all areas of suspected disability. (Ed. Code, § 56320.) The law requires parental consent before the student can be evaluated. (20 U.S.C. § 1414(a)(1)(C)(i); Ed. Code, § 56321.)

8. California Education Code section 56320, subdivision (g), requires that the assessment be conducted by persons knowledgeable of the suspected disability. The assessment materials must assess specific areas of education need and not merely provide a single general intelligence quotient. (Ed. Code, § 56320, subd.(c).) Moreover, psychological assessments, including individually administered tests of intellectual or emotional functioning must be administered by a credentialed school psychologist. (Ed. Code, §§ 56320, subd.(b)(3) and 56324).) Assessments must be conducted by persons competent to perform assessments, as determined by the school district, county office, or special education local plan. (Ed. Code, § 56322.)

9. The student is also a necessary component of the assessment. Parental consent is required before a student can be evaluated. (20 U.S.C. § 1414 (a)(1)(C)(i); Ed. Code, § 56321, subd.(c).) A school district's obligation to provide services does not arise until the parents have made the student available for assessment. (*Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176.)

10. An IEP must include a statement of the child's present levels of educational performance; a statement of measurable annual goals; a statement of the special education and related services and supplementary aids and services to be provided; and a statement of how the child's progress toward the goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i), (ii)(iii) and (vii)(I); 34 C.F.R. § 300.347(a)(1), (2), (3) and (7)(i); Ed. Code, § 56345, subd. (a)(1), (2), (3) and (9).)

11. While the required elements of the IEP further important policies, "rigid 'adherence to the laundry list of items [required in the IEP]' is not paramount." (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484, citing *Doe v. Defendant I* (6th Cir. 1990) 898 F. 2d 1186, 1190-1191.)

12. An IEP is evaluated in light of information available at the time it as developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)[5] "An IEP is a snapshot, not a retrospective." (*Ibid.*) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

13. In addition to these substantive requirements, the Supreme Court recognized the importance of adhering to the procedural requirements of the Act. The analysis of whether a student has been provide a FAPE is two-fold: (1) the school district must comply with the procedural requirements of the Act, and (2) the IEP must be reasonably calculated to provide the child with educational benefits. (*Board of Education of Hendrck Hudson Center School District, Westchester County v. Rowley* (1982) 458 U.S. 176, 198 (*Rowley).*)

14. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d at 977, 892.) To constitute a denial of FAPE, procedural violations must result in deprivation of educational benefit or a serious infringement of the parent's opportunity to participate in the IEP process. (*Ibid.*)

15. In determining the educational placement of a disabled child, the public agency must ensure that the placement is based on the child's IEP. (34 C.F.R. § 300.552.) Predetermination is a procedural violation which deprives a student of a FAPE in those instances where placement is determined without parental involvement at the IEP. Merely pre-writing proposed goals and objectives does not constitute predetermination. The test is whether the school board comes to the IEP meeting with an open mind and several options are discussed before final recommendation is made. (*Doyle v. Arlington County School Board* (E.D. Va 1992) 806 F.Supp.1253, 1262; *Deal v. Hamilton County Board of Education,* (6th Cir. 2005), 392 F.3d 840.)

16. A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414 (d)(1)(B)(i); 35 C.F.R. § 300.344(a)(1); Ed Code, § 56341, subd.(b)(1).) The IEP team must consider the concerns of the parents for enhancing their child's education throughout the child's education (20 U.S.C. §§ 1414(c)(1)(B) [during evaluations], (d)(3)(A)(i) [during development of IEP], (d)(4)(A)(ii)(III) [during revision of IEP]; 34 C.F.R. §§ 300.343(C)

[5] Although *Adams* involved an IFSP and not an IEP, the Ninth Circuit applied the analysis in *Adams* to other issues concerning an IEP. District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP.(*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F. Supp.2d 1213, 1236.)

(2)(III) [during IEP meetings], 300l533(a)(1)(i) [during evaluations]; Ed Code §§ 56341.l subd. (a))1) [during development of IEP], subd.(d)(3) [during revision of IEP], and subd.(e) [right to participate in an IEP].)

17. In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but a meaningful IEP meeting. (*W.G., supra*, 960 F. 2d 1479, 1485.) A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Board of Education* (3rd Cir. 1993) 993 F. 2d 1031,
1036.)

18. At least one regular education teacher shall be included on the IEP team if the child is or may be participating in the regular school education environment. (20 U.S.C § 1414(d)(1)(A)(iv); Ed. Code, § 56341, subd. (b)(2).) A school district's failure to obtain any input or participation from the Student's regular classroom teacher may be a serious procedural violation. (*W. G., supra*, 960 F. 2d at pp. 1484-85.) The rationale for requiring the attendance of a regular education teacher is closely tied to Congress's "least restrictive environment" mandate. (*Deal v. Hamilton, supra*, 392 F.3d 840.)

19. A school district must provide "a basic floor of opportunity…[consisting] of access to specialized instruction and related services which are individually designed to provide educational benefit to the [child with a disability]." (*Rowley, supra*, 458 U.S. at p. 201.) The intent of the Individuals with Disabilities Education Act is to "open the door of public education" to children with disabilities; it does not "guarantee any particular level of education once inside." The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Id.* at p. 197, 200; *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is required to provide an education that confers some educational benefit upon the child. (*Rowley, supra*, 458 U.S. at p. 200.)

20. A parent is entitled to obtain an Independent Educational Evaluation (IEE) of a child. (20 U.S.C § 415(b)(1).) An IEE is an evaluation conducted by a qualified examiner not employed by the school district responsible for the child's education. (34 C.F.R. § 300.502 (a)(3)(i).) A parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by a school district. (34 C.F.R. § 300.502(b)(1); Ed Code, § 56329, subd. (b).) When a parent requests an IEE at public expense, the school district must either initiate a due process hearing to show that its evaluation is appropriate, or provide the IEE at public expense. (34 C.F.R. § 300.02 (c)(1); Ed. Code, § 56329, subd.(c).) An IEE obtained at private expense must be considered by the district in any decision concerning a FAPE for the child. (34 C.F.R. § 300.502 (c)(1); Ed. Code, § 56329, subd.(c).)

21. Parents may be entitled to reimbursement for the costs of placement or services they have independently procured for their child when the school district has failed to provide a FAPE and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. §1412(a)(10)(C); *School Committee of the Town of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-370.) Court decisions subsequent to *Burlington* have also extended relief in the form of compensatory education to students who have been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1497.)

Determination of Issues

Did DSUSD fail to offer Student a FAPE for part of the 2004-2005 school year?

A. Student contends the District denied him a FAPE by failing to have an IEP in place by his third birthday.

22. The legislation's inclusion of a statutory time frame supports the premise that preparation of a valid assessment and reasonable placement plan takes time. Based upon Finding 4, it is undisputed that at the earliest, Mother and IRC contacted DSUSD 30 days prior to Student's third birthday. By all accounts this was an insufficient period of time to complete an assessment and placement plan.

23. As determined in Findings 5 through 7, the District made reasonable attempts to comply with the procedures for preparing an IEP, within the short time frame it was provided. The procedural violation of any time limitations by the District was minimal and did not constitute a substantial denial of FAPE. Student was not deprived of any educational benefit. All existing services for student remained in tact after his third birthday. Regardless of the District's actions, the parents never made Student available for the assessment. Without student's participation in an assessment, it was impossible for the District to prepare an IEP.

B. Student contends the March 8, 2005 meeting represented a formal IEP which denied him a FAPE with the offer of placement at Monroe School.

24. The March 8, 2005 meeting did not qualify as an IEP meeting. Based upon Finding 7, the parents had not yet signed the Assessment Plan and Student had not been evaluated. The IEP form was incomplete and could in no way be interpreted as a formal IEP. Without an assessment, it was impossible to ascertain current levels of functioning and subsequently, valid goals and objectives for Student.

25. It is clear that the District did not consider the March 8, 2005 meeting to be a formal IEP meeting, but rather an initial meeting to begin the transition process. The testimony from all district witnesses as well as the tape of the meeting itself is replete with references to the District's attempt to schedule the next IEP as soon as possible in order to

determine a valid placement for Student. Pursuant to Finding 7, the mission on March 8, 2005, was to get Student temporarily placed as soon as possible to avoid a lapse in services. The Monroe School placement was offered on an interim basis as IRC services were scheduled to end March 18, 2005.

26. DSUSD was prepared to develop an IEP and provide an offer of FAPE to Student. In order to do so the District requested to conduct assessments of Student and afterward reconvene an IEP meeting in order to make an appropriate offer. The Monroe School placement was presented as an interim placement to avoid a lapse in services while the assessment was being completed and an IEP could be developed with further consideration of placement. In this case, DSUSD did not offer Student a FAPE. Without Student's participation in an assessment, the District was not required to do so.

Did RUSD deny Student a FAPE for the 2004-2005 school year and 2005 ESY?

C. Student contends the IEP presented on July 14, 2005, was predetermined by the District.

27. The July 14, 2005 IEP was not predetermined. Merely pre-writing proposed goals and objectives does not constitute predetermination. The IEP team asked Mother to provide additional information and comments for the IEP. In general, Mother declined to do so. Based upon Findings 15 and 16, the District did heed what little information Mother did provide. Once the District learned that the parents wanted an ABA program, the IEP meeting was tabled pending further investigation of Student's current program. There was no evidence that the District team had predetermined the IEP or was unwilling to consider input from the parents.

D. Student contends his parents were denied meaningful participation in the IEP meeting.

28. As determined in Findings 13 through 16, the parents did participate in the IEP process. A parent was present during the assessment as well as in attendance at the IEP meeting. The District solicited information from the parents. The fact that the parents did not participate as fully as they could have does not necessarily deny FAPE. Parental participation does not require that the District agree or acquiesce to the preferences of the parents any more than it requires the parents to agree with the District. In this case, no final offer had been made. Clearly the District was expecting to continue investigation of options for Student. This was a direct result of parental input.

E. Student contends he was denied a FAPE by the omission of a general education teacher at the IEP meeting.

29. Pursuant to Finding 15, the District failed to include the participation of at least one general education teacher at the July 14, 2005 IEP meeting. The omission of a general education teacher in this case did not result in a significant denial of FAPE. The IEP meeting

was not completed on July 14, 2005, and a second meeting was anticipated by the District. Further, general education had not been recommended nor were the parents requesting it. Student was actually seeking a more restrictive environment.

F. Student contends the RUSD assessment was not administered by qualified personnel.

30. As determined in Findings 10 and 11, all District personnel administering tests to Student met minimum statutory requirements. Both Ms. Anderson and Ms. Clem have extensive experience in special education testing with RUSD. In hindsight, the testing procedures and protocols were, as Dr. Lenington would describe, "sloppy." The issue, however, is whether the testing was so sloppy as to render the results invalid. The District's results were consistent with both the IRC and Dr. Lenington evaluations.

G. Student contends the RUSD test results were invalid.

31. As would be expected, Dr. Lenington's assessment was far more expansive and detailed than the District's report. Dr. Lenington pointed to several items that "could" result in invalid findings; however, nowhere did she provide specific results which "were" invalid. Further, although Student had been attending a private preschool, Dr. Lenington did not observe Student in this group setting, nor did she discuss Student's behavior or progress (or lack thereof) in this setting.

32. Pursuant to Findings 10, 11, 22, and 27, Dr. Lenington's ultimate test results were not markedly different from either the District's test results or the IRC's findings. As Ms. Chavez remarked, "The results are the same. The conclusions are different."

33. Based upon the information in its possession at the time, the District's initial conclusions regarding Student's performance levels were valid. They could have been far more precise, had the parents provided pertinent information regarding Student to the District as they did for Dr. Lenington.

H. Student contends the District fail to develop appropriate services for him.

34. There is no doubt that the LIFE program had been individually designed to provide maximum educational benefit to Student. There is no doubt that any student would benefit from one-on-one teaching. That, however, is not the criteria for IDEA. The issue is whether a school district can provide a plan that is "appropriate," one that can provide "some benefit." The issue of appropriate services for Student is not ripe for determination because the District has yet to be allowed to complete the IEP and make a formal offer of placement.

35. The parents requested that the District consider their ABA program. The District was agreeable to explore the possibilities of this request, and tabled completion of the IEP pending such consideration. In return, the District requested that the parents provide additional information and attend another IEP meeting to complete the IEP. The District

attempted to assess Student's LIFE Program. The parents failed to follow through with information or the rescheduling of the IEP. Given that the information was never provided and the IEP was never reconvened, the District could not make a final offer of placement. Until such time as an offer can reasonably be made and considered, there can be no determination as to whether a placement is appropriate.

36. If Student wishes to receive any special education services from the District, he must cooperate with the District to complete the IEP process. Both Mr. Cross and Ms. Garcia emphasized the steady progress Student was making in the LIFE program. Now a year later, it is advisable to retest Student to update his current levels of performance in order to provide clear goals and objectives for Student. This will require parental participation not only in providing updated information, but also in attending and candidly participating in another IEP meeting. In that event, the District must carefully consider the expanded information now in its possession regarding Student's unique abilities and needs.

I. Student contends that Dr. Lenington's evaluation constitutes an Independent Educational Evaluation (IEE) for which he is entitled to reimbursement.

37. Based upon Findings 14 and 21, Dr. Lenington's evaluation does not qualify as an IEE. The parents sought an evaluation of Student prior to moving to RUSD. The appointment with Dr. Lenington was made prior to the RUSD assessment and IEP. As such, Dr. Lenington could not have been employed to provide a second opinion or IEE of an assessment that did not exist at the time. At no time did the parents indicate disagreement with Student's assessment. The parents did not request that the District provide an IEE. Further, the parents never disclosed the appointment with Dr. Lenington to the District, nor did they ever share Dr. Lenington's evaluation with the District.

J. Student contends he is entitled to reimbursement for the LIFE Program.

38. The award of reimbursement is an equitable issue. The conduct of both parties must be reviewed to determine whether relief is appropriate. Parents have an equitable right to reimbursement or the cost of compensatory education where a school district has failed to provide a FAPE. Procedural violations, however, do not necessarily result in the denial of a FAPE unless the violation results in the loss of an educational opportunity or seriously infringes upon the parent's opportunity to participate in the IEP process.

39. Pursuant to Finding 28, Student's enrollment in the LIFE program was a unilateral placement by his parents prior to the June 16, 2005 assessment. Student was fully involved in the LIFE Program prior to the July 14, 2005 IEP. This was the program the parents wanted for Student.

40. Pursuant to Finding 16, Mother did request that the District pay for Student's LIFE Program. Nonetheless, based upon all findings and circumstances in this matter, there has been no substantial denial of a FAPE. The District made reasonable attempts to consider all options and create an appropriate placement for Student. The District was

continually rebuffed by the parents who failed to share information and provide necessary data. Further, the parents failed to allow the IEP to be reconvened which would have allowed the District to make a final offer of placement. It is patently unfair to determine that the District has failed to offer a FAPE where the parents are the source of the failure. In this matter, the District had not made a formal offer of placement; therefore there was no offer for the parents to reject. Student is not entitled to reimbursement for the LIFE Program.

ORDER

1. Student's requests for relief against DSUSD and RUSD are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with the statute:

1. Desert Sand Unified School District has prevailed on all issues.

2. Riverside Unified School District has prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, §56505, subd. (k).)

Dated: May 5, 2006

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JUDITH L. PASEWARK
Administrative Law Judge
Special Education Division
Office of Administrative Hearings